> from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees." 29 U.S.C. §794(a).

Section 2000d-7(a)(1) of the Civil Rights Remedies Equalization Act of 1986 provides:

> "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. §2000d-7(a)(1).

STATEMENT

The Department challenged the district court's subject-matter jurisdiction over Espinoza's Rehabilitation Act claim on the ground that Congress has not validly abrogated or effected a waiver of the State's sovereign immunity from such a suit. The district court rejected this challenge, holding that the Department's acceptance of federal funds waived its immunity under Section 2000d-7(a) of the Civil Rights Remedies Equalization Act of 1986. On appeal, the court of appeals affirmed, Pet. App. 3, applying two decisions rendered in companion cases by a sharply divided en banc court: *Pace v. Bogalusa City School Board*, 403 F.3d 272 (CA5 2005) (en banc), Pet. App. 17-76, and *Miller v. Texas Tech University Health Sciences Center*, 421 F.3d 342 (CA5 2005) (en banc), Pet.App. 77-94. *Pace* foreclosed the Department's argument that Section 2000d-7(a) failed to unambiguously create a conditional waiver. And *Miller* foreclosed the Department's argument that Section 2000d-7(a) is invalid under *South Dakota v. Dole*, 483 U.S. 203 (1987), to the extent it predicated a waiver of immunity from Rehabilitation Act suits on the receipt of federal funds wholly unrelated to that statute. The Department petitions this Court for review because the court of appeals's judgment is inconsistent with this Court's decisions, squarely conflicts with a decision of another court of appeals, and wrongly decides an issue of great importance to the States.

Julie Dunlop Espinoza has limited range of motion in her joints because she contracted juvenile rheumatoid arthritis as a child. Pet App. 5; SR.2.[1] She uses crutches or a motorized scooter because she cannot walk unassisted. Pet. App. 5.

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1. Supplemental Record references are designated "SR.(page #)." The original Record mistakenly included internal district-court documents. The Supplemental Record is the corrected Record with the internal court documents removed.

In May 2000, Espinoza applied to renew her driver's license at a Department office. *Id.* The Department informed Espinoza that it had received information indicating that her condition could prevent her from safely operating a motor vehicle and, to that end, requested that Espinoza take a comprehensive examination to demonstrate her ability to drive. *Id.* In response, Espinoza's attorney asserted that the Department's request was based solely on the observations of the clerk who processed Espinoza's license renewal and demanded that the Department withdraw its request for a comprehensive examination. SR.4, 12, 102. The Department declined to withdraw its request. *Id.*, at 4, 15, 102.

In September 2000, Espinoza sued the Department under Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. §794(a). Pet. App. 5. She alleged that, by requiring her to take a comprehensive examination based solely on the license clerk's observations without any further showing that the examination is reasonable and necessary, the Department had "excluded her from participation in, denied her the benefits of, and subjected her to discrimination under a program or activity receiving Federal financial assistance" on the basis of her disability in violation of Section 504. *See id.* Although the Department does receive some federal funding under other programs, SR.2, 101, it does not receive any funds related to the Rehabilitation Act, C.A. Appellant's Br. 24.

The Department filed a motion to dismiss for lack of subject-matter jurisdiction based on the State's sovereign immunity from suit under the Eleventh Amendment. Pet. App. 6.[2] The district

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2. Originally, Espinoza also asserted a claim against the Department under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §12132. Pet. App. 5. In response to the Department's motion to dismiss the ADA claim, Espinoza conceded that the Eleventh Amendment insulated the Department from this claim. *Id.*, at 10. Accordingly, she sought and obtained leave to amend her complaint to assert her ADA

court denied the motion, reasoning that the Department's receipt of federal funds effected a waiver of its immunity from Rehabilitation Act suits under 42 U.S.C. §2000d-7(a)(1). *Id.*, at 10. The Department filed an interlocutory appeal. SR.263. The district court stayed its proceedings pending the appeal. *Id.*, at 274-75.

On appeal, the Department advanced several arguments in support of its immunity from Espinoza's claim. Among these, the Department urged that Section 2000d-7(a) exceeded two limitations on Congress's spending power that the Court enumerated in *Dole*: (1) that conditions imposed on the recipients of federal funds must be unambiguous; and (2) that the conditions must be reasonably related to the purpose of the funds. 483 U.S., at 207-08.

First, the Department contended that Section 2000d-7(a) does not unambiguously condition States' receipt of federal funds upon voluntary *waiver* of their immunity from Rehabilitation Act claims because the statute is phrased in terms purporting to *abrogate* the States' immunity ("[a] State shall not be immune"). *See* C.A. Appellant's Br. 10-23; 42 U.S.C. §2000d-7(a)(1). At the time the Department accepted the funds at issue in this case, federal courts had construed similar language in the ADA to validly abrogate the State's immunity, rather than to establish a conditional waiver predicated on the State's acceptance of federal funds. *See, e.g.*, *Coolbaugh v. Louisiana*, 136 F.3d 430 (CA5 1998). This precedent was overruled only after the Department had accepted the funds purporting to waive its immunity in this case—specifically, after the Court ruled in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), that the attempted abrogation upheld in *Coolbaugh* was an invalid exercise of congressional power. *See*

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claim against the Department's Director under the *Ex parte Young* exception to sovereign immunity. *Id.*, at 11-12. That claim remains pending in the district court.

Reickenbacker v. Foster, 274 F.3d 974, 981 (CA5 2001) (explaining that *Garrett* effectively overruled *Coolbaugh*'s abrogation holding). Thus, the Department further argued, the abrogation language in Section 2000d-7(a) not only injected ambiguity in the statute in violation of *Dole*, but that ambiguity also prevented the Department from *knowingly* waiving its immunity by accepting federal funds in 2000 because, at that time, the Department reasonably believed that the ADA—or similar abrogation language in Section 2000d-7(a)—had already abrogated that immunity. *See* C.A. Appellant's Br. 36-38.

Second, the Department contended that Section 2000d-7(a) contravenes *Dole*'s requirement that conditions on federal grants be related "to the federal interest in *particular* national projects or programs," 483 U.S., at 207, because the statute requires state agencies to forfeit immunity from Rehabilitation Act suits as a condition of accepting *any* federal funds, regardless of whether the funds are related to the Act or its objectives. *See* C.A. Appellant's Br. 23-27. Because the Department did not accept any federal funds related to the Act or its goals, the Department urged that Section 2000d-7(a) could not constitutionally effect a waiver of its immunity from Espinoza's suit under *Dole*. *Id.*, at 27.

In response, the United States intervened in the appeal to defend the constitutionality of Section 2000d-7(a). Before the scheduled oral argument date, however, the court of appeals voted to rehear en banc a companion Rehabilitation Act case that presented the Department's ambiguity and relatedness arguments. *Pace v. Bogalusa City Sch. Bd.*, 339 F.3d 348, 349 (CA5 2003). In light of this development, the court of appeals canceled oral argument in the instant case and decided to hold it in abeyance pending the en banc court's decision in *Pace*. *See* Pet. App. 3.

In *Pace*, the en banc court of appeals held that Section 2000d-7(a) satisfied *Dole*'s requirement that spending conditions be

unambiguous. Pet. App. 33-34. The court also rejected the related point that the statute's abrogation language prevented a state agency from knowingly waiving its immunity by accepting federal funds. *Id.*, at 39. The court did not reach the relatedness challenge to Section 2000d-7(a) under *Dole* because it determined that the state defendants in *Pace* had waived that issue. *Id.*, at 30 n.32.

The court acknowledged that Congress drafted Section 2000d-7(a) with the intent to abrogate States' sovereign immunity under Section 5 of the Fourteenth Amendment. *Id.*, at 33. Nevertheless, the court concluded that "the very same provision" purporting to abrogate also established a conditional waiver of immunity that met *Dole*'s "clear and unambiguous" standard. *Id.*, at 34. The court explained that "Congress need not declare in the statute whether it is proceeding under abrogation or waiver, *or both*." *Id.* (emphasis added). Thus, while candidly admitting that Section 2000d-7(a) is "janus-faced," the court nonetheless concluded that the statute is "unambiguous, as required by *Dole*." *Id.*

By an 8-6 margin, a majority of the court of appeals further rejected the argument that, because the statute's language had previously been interpreted to validly abrogate sovereign immunity, the state defendants could not have known that they retained any immunity to waive by accepting federal funds—a holding that the majority recognized was in direct conflict with the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (CA2 2001). Pet. App. 34-39. The majority reasoned that, because the Rehabilitation Act itself applies only to entities receiving federal funds, the state defendants knew that they could avoid "abrogation" of their immunity under Section 2000d-7(a) by refusing federal funds. *Id.*, at 36-38. The majority explained that, having held that Section 2000d-7(a) unambiguously established a conditional waiver of immunity, the State was "conclusively presumed to have 'known' that receipt of clearly conditioned federal funds" would result in a waiver of its immunity. *Id.*, at 38.

Writing for six judges in dissent, Judge Jones disagreed that a waiver is "conclusively presumed" to be knowing if the spending condition is deemed unambiguous. *See id.*, at 69 (Jones, J., joined by Jolly, Smith, Barksdale, Garza, and DeMoss, JJ., dissenting). Rather, she stated that satisfaction of *Dole*'s "unambiguous" requirement "is only half of the waiver equation." *Id.* Citing *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680-81 (1999), Judge Jones noted that "not only must Congress make clear its intention to . . . condition federal funds, but the State must expressly and unequivocally waive its immunity." Pet. App. 69. Such a "clear declaration" of the State's intent to waive immunity requires "clear comprehension of the consequences of the waiver." *Id.*, at 70 (quotation omitted). That clear comprehension was lacking here, Judge Jones explained, because the state defendants accepted federal funding at a time when extant case law held that the Section 2000d-7(a) language had already abrogated States' sovereign immunity. *Id.*, at 70-71. Thus, Judge Jones endorsed the Second Circuit's conclusion that "since 'the proscriptions of Title II [of the ADA] and §504 are virtually identical, a State accepting federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damage suits, since by all reasonable appearances state sovereign immunity had already been lost.'" *Id.*, at 71-72 (quoting *Garcia*, 280 F.3d, at 114).

After *Pace* issued, the Department acknowledged that *Pace* foreclosed its arguments based on Section 2000d-7(a)'s abrogation language, but it also noted that another en banc companion case presented the Department's remaining arguments, including its point that Section 2000d-7(a) does not satisfy *Dole*'s "relatedness" prong. *Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 342 F.3d 563 (CA5 2003). Accordingly, the Department and the United States urged the court of appeals to continue to hold this case in abeyance pending the en banc court's decision in *Miller*.

In *Miller*, by a 9-6 margin, the court of appeals reaffirmed its holding in *Pace* that the presence of abrogation language in Section 2000d-7(a) did not preclude the state defendants from knowingly waiving their sovereign immunity. Pet. App. 79, 83. Again writing for six judges, Judge Jones disagreed for the reasons expressed in *Pace*. *Id.*, at 94. The *Miller* court also rejected the argument that Section 2000d-7(a) fails *Dole*'s requirement that spending conditions be reasonably related to the purpose of the expenditure. *Id.*, at 87-89. The court held that an agency accepting funds waives its immunity from Rehabilitation Act suits "even though the federal funds are not earmarked for programs that further the anti-discrimination and rehabilitation goals of §504." *Id.*, at 87. In so doing, the court adopted the Third Circuit's reasoning in *Koslow v. Commonwealth*, 302 F.3d 161 (CA3 2002). *Koslow*, in turn, held first that *Dole*'s relatedness requirement was satisfied because Congress had expressed in the Rehabilitation Act "a clear interest in eliminating disability-based discrimination in state departments"—an interest that "flows with every dollar spent by a department or agency receiving federal funds." Pet. App. 89 (quoting *Koslow*, 302 F.3d, at 175-76). Second, *Koslow* noted that Section 2000d-7(a)'s waiver is limited to the agency receiving the funds and does not require waiver by other agencies or the State as a whole, which "helps ensure" that the waiver satisfies *Dole*'s relatedness requirement. *Id.* (quoting *Koslow*, 302 F.3d, at 176). Finally, *Koslow* observed that Rehabilitation Act funds "are frequently not tracked," precluding any determination of how the receiving agency spends the federal funds. *Id.*

Shortly after *Miller* was decided, the court of appeals issued its opinion in this case. Pet. App. 1-3. The court of appeals affirmed the district court's order denying the Department's motion to dismiss the instant case on the ground that all of the Department's immunity arguments were foreclosed by *Pace* and *Miller*. *Id.*, at 3.

REASONS FOR GRANTING THE PETITION

This petition presents two important questions concerning the reach of Congress's spending power and, thus, the proper balance of power between the federal government and the States. First, the circuits are divided as to the prerequisites for a knowing, valid waiver of Eleventh Amendment immunity when States accept federal funds. A sharply divided en banc court of appeals, in an opinion on which the decision below was based, held that Section 2000d-7(a) unambiguously conditions grants of federal funds on States' consent to suit in federal courts, even though the court admitted that the statute is "janus-faced" and by its terms attempts to directly abrogate Eleventh Amendment immunity. According to the court of appeals, any ambiguity in the statute is no barrier to a knowing, valid waiver of immunity. Other circuits have joined the court of appeals in holding that a knowing waiver occurs pursuant to Section 2000d-7(a) when a State accepts federal funds, even if that State could have reasonably believed that its immunity had already been abrogated. The Second Circuit, on the other hand, has squarely held that a State did not knowingly waive its immunity by accepting federal funds under Section 2000d-7(a). The Court should grant certiorari to resolve this conflict.

In a second companion case to the decision below, the en banc court of appeals held that a state agency that accepts *any* federal funds must forfeit its immunity from Rehabilitation Act suits in aid of Congress's general interest in discouraging disability discrimination. This conclusion directly contravenes the Court's holding in *Dole* that conditions on federal grants must be related to the federal interest in "particular" national programs. *Dole*, 483 U.S., at 207. Although all other circuits to decide the question have reached the same conclusion, this lack of a circuit split on the second question does not foreclose review; indeed, this compounded error provides even more reason why the Court should grant certiorari. If allowed to stand, the principle that Congress can

condition the States' retained sovereign immunity on the forfeiture of every single penny of federal money for any program whatsoever would render the "relatedness" inquiry of *Dole* a dead letter.

The Court should grant the petition to resolve the conflict between the Second Circuit and nine other circuits and to address these important issues that implicate the balance of power between the federal government and the States.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER 42 U.S.C. §2000d-7(a) UNAMBIGUOUSLY CONDITIONS THE RECEIPT OF FEDERAL FUNDS UPON THE WAIVER OF SOVEREIGN IMMUNITY AND TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER STATES KNOWINGLY WAIVE THEIR ELEVENTH AMENDMENT IMMUNITY PURSUANT TO THAT SECTION BY ACCEPTING FEDERAL FUNDS.

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court held that Section 504 of the Rehabilitation Act failed to validly abrogate state sovereign immunity and failed to condition the receipt of federal funds upon a State's waiver of that immunity because the statute lacked the clear and unambiguous language to do either. In response to *Atascadero*, Congress enacted the Civil Rights Remedies Equalization Act of 1986, 42 U.S.C. §2000d-7(a), providing explicit language attempting to abrogate state immunity:

> (1) A State *shall not be immune* under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance. 42 U.S.C. §2000d-7(a)(1) (emphasis added; citations omitted).

At the time that Congress enacted Section 2000d-7(a), it believed it had the Article I authority to abrogate state sovereign immunity directly, *see Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989) (plurality op.), and that is exactly what Congress attempted to do. Since 1986, however, the Court's precedents have raised substantial doubts as to the constitutionality of that attempted abrogation. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Congress lacks the authority to abrogate state sovereign immunity under Article I); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Title I of the ADA exceeded Congress's authority under Section 5 of the Fourteenth Amendment).

Last Term, this Court's decision in *Tennessee v. Lane*, 541 U.S. 509, 518 (2004), opened a narrow avenue under which Congress's attempted abrogation could possibly be deemed valid; and had this case proceeded as an abrogation case, the court of appeals would presumably have assessed whether Espinoza's claimed right to obtain a drivers' license without any assessment of her physical ability to drive safely was somehow comparable to the fundamental right of access to courts at issue in *Lane*. That inquiry would have yielded a straightforward and obvious resolution.

Instead, the court treated abrogation language as conditional waiver language, notwithstanding the plain text to the contrary.

A. Unambiguous Statutory Language Is an Essential Prerequisite to a Valid Spending Clause Condition.

The Court has suggested that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions [including, possibly, voluntary waiver of sovereign immunity] that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *Coll. Sav. Bank*, 527 U.S., at 686. However, the Court has also held that "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero*, 473 U.S.,

at 246-47. Thus, certain preconditions must be satisfied before acceptance of federal funds may give rise to a waiver of immunity.

First among those criteria is that Congress must "manifest[] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Id.*, at 247. "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S., at 17.

Second, the State must clearly and unambiguously demonstrate its knowing intention to voluntarily relinquish its immunity. *See Coll. Sav. Bank*, 527 U.S., at 682 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding that effective waiver requires the "intentional relinquishment or abandonment of a *known* right or privilege") (emphasis added)). "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S., at 17.

B. Section 2000d-7(a) Does Not Clearly and Unambiguously Condition the Receipt of Federal Funds on the Waiver of Sovereign Immunity.

Although Section 2000d-7(a) demonstrates Congress's unmistakable desire that States be subject to suit in federal court, it is less than clear that Congress intended to accomplish that objective indirectly by conditioning waiver on the receipt of federal funds instead of directly by abrogation. Congress's declaration that States "shall not be immune . . . from suit in Federal court" is on its face language of abrogation.

Indeed, the Court has observed that almost identical language in the ADA demonstrates clear congressional intent to *abrogate* state immunity. *See Garrett*, 531 U.S., at 363-64 (discussing 42

U.S.C. §12202, which states "[a] State *shall not be immune* under the Eleventh Amendment the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter" (emphasis added)); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (same).

Tellingly, terms such as "waiver" or "condition," which would naturally suggest an effort to invite States to consent, are absent from either statute. And, given the existing state of the law in 1986, Congress had no reason to attempt a conditional waiver—because at the time it believed it had full abrogation authority.

1. The reference to "federal funds" in Section 2000d-7(a) does not transform the abrogation language into clear and unambiguous conditional waiver language.

The principal reed upon which the court of appeals relied in finding conditional waiver language was the inference it drew from the statutory phrase "by recipients of Federal financial assistance" at the end of Section 2000d-7(a). *See* Pet. App. 29, 36-38. That pedicel cannot support such weight.

First, that it is merely an inference by itself refutes that Congress has acted "unequivocal[ly]" or "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S., at 247.

Second, as the six dissenting judges observed, *Pace* "conflates abrogation and waiver." Pet. App. 72. Each concept is distinct. With abrogation, Congress is the lone actor. Assuming it has ample authority, once Congress unilaterally abrogates the States' immunity, that immunity is no more. In contrast, waiver is a two-step process. First, Congress must unambiguously condition receipt of funds upon waiver, and second, States must unambiguously express their waiver.

With waiver, there is a temporal ordering; by analogy to contract, Congress extends an offer, and the States accept (or not). Section 2000d-7(a) exhibits none of that temporal priority. Instead, it purports to be unilateral and immediately self-executing: "A State *shall not be immune* under the Eleventh Amendment."[3]

2. Dicta from *Lane v. Pena* does not support the court of appeals's reading of Section 2000d-7(a) as clear and unambiguous waiver language.

The second support for the court of appeals's conclusion was a misreading of dicta from *Lane v. Pena*, 518 U.S. 187 (1996). *See* Pet. App. 32 n.38. *Pena*, however, did not address the issue of state sovereign immunity. Instead, the issue was whether Section 2000d-7(a) subjected the *federal* government to private suits for violations of Section 504. *See* 518 U.S., at 197-98. In answering that question in the negative, the Court discussed the effect of Section 2000d-7(a) on the States' immunity:

> "Section [2000d-7(a)] was enacted in response to our decision in [*Atascadero*], where we held that Congress had not unmistakably expressed its intent to *abrogate* the States' Eleventh Amendment immunity in the Rehabilitation Act . . . . By enacting [Section 2000d-7(a)], Congress sought to

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3. To be sure, a state agency could perhaps avoid federal suit by renouncing all federal funds from all federal sources, but that inverts the order; it suggests an abrogation, and then a subsequent vehicle for a State to act to circumvent the abrogation in the future rather than a conditional offer yielding a future possible acceptance and waiver of immunity. Phrased differently—again by analogy to contract—a proper conditional waiver is void unless and until a State knowingly and voluntarily accepts the condition and chooses to waive sovereign immunity; Section 2000d-7(a), by contrast, is immediately operative and, at most, makes Congress's attempted abrogation voidable, should a state agency subsequently choose to renounce all federal funds from all sources.

> provide the sort of unequivocal *waiver* that our precedents demand . . . . Given the care with which Congress responded to our decision in *Atascadero* by crafting *an unambiguous waiver* of the States' Eleventh Amendment immunity in [Section 2000d-7(a)], it would be ironic indeed to conclude that that same provision 'unequivocally' establishes a waiver of the Federal Government's sovereign immunity." *Id.*, at 198, 200 (emphasis added).

The court of appeals, and numerous other circuits, have seized upon the Court's reference to Section 2000d-7(a) as "an unambiguous waiver" as conclusively determining that that Section constituted conditional waiver language. *See, e.g., Robinson v. Kansas*, 295 F.3d 1183, 1189-90 (CA10 2002), *cert. denied*, 123 S.Ct. 2574 (2003); *Koslow*, 302 F.3d, at 170; *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 555 (CA7 2001); *Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626, 628 (CA6 2001), *cert. denied*, 536 U.S. 922 (2002); *Pederson v. La. State Univ*, 213 F.3d 858, 876 (2000); *Jim C. v. United States*, 235 F.3d 1079, 1082 (CA8 2000) (en banc); *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (CA4 1999); *Sandoval v. Hagan*, 197 F.3d 484, 493 (CA11 1999), *rev'd in part on other grounds sub nom Alexander v. Sandoval*, 532 U.S. 275 (2001); *Clark v. California*, 123 F.3d 1267, 1271 (CA9 1997).

Despite the multiplicity of circuits, the *Pena* dictum said no such thing. In full context, *Pena* was addressing *abrogation*, not waiver, despite the passing use of the word "waiver." "Abrogation" and "waiver" were seemingly used interchangeably in the discussion, and, critically, the Court used the word "waiver" as an action performed by Congress—not the States. *Pena*, 518 U.S., at 198, 200. Congress can "waive" the States' immunity only by unilaterally abrogating it. Thus, the Court presumably intended "waiver" to mean "abrogation"; in any event, the courts of appeals'

repeated reliance on this passage, as conclusively resolving the import of Section 2000d-7(a), is surely misplaced.

C. The Fifth Circuit's Decision Conflicts with This Court's Precedent and with a Decision of the Second Circuit.

The court of appeals's decision in *Pace* widens an existing split between the Second Circuit and every other circuit to consider whether Section 2000d-7(a) can form the basis of a knowing waiver. Moreover, the conclusion that Section 2000d-7(a) is unambiguous conflicts with the Court's holding in *Atascadero* that the clear-statement rule requires notice not only of the fact that immunity may be lost, but also of the *method*—whether abrogation, consent, or both. The Court should grant certiorari to resolve the circuit split and to clarify its precedent.

1. The Fifth Circuit's decision widens the circuit split regarding Section 2000d-7(a).

The circuits are divided as to whether a State's acceptance of federal funds necessarily gives rise to a knowing, valid waiver of state sovereign immunity under Section 2000d-7(a). After examining the language and history of Section 2000d-7(a), the Second Circuit in *Garcia* held that a State did not knowingly waive its immunity if it could have reasonably believed that its immunity had already been abrogated. *See* 280 F.3d, at 114.[4] Because, at the time it accepted federal funds, New York reasonably believed it had no immunity to waive, *Garcia* held that the acceptance did not operate as a knowing waiver. *Id.* The six-judge dissent in *Pace* would likewise have adopted the Second Circuit's approach. *See* Pet. App. 71-72.

In direct conflict with this approach, the *Pace* majority joined eight other circuits in holding that Section 2000d-7(a)

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4. Although *Garcia* did find Section 2000d-7(a) to be waiver language, 280 F.3d, at 113, it found no knowing waiver by the State.

unambiguously conditions acceptance of federal funds on waiver of state sovereign immunity and that the statute can support a knowing waiver. *See id.*, at 34-39; *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 129-30 (CA1 2003); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 244-51 (CA3 2003); *Bruggeman v. Blagojevich*, 324 F.3d 906, 912 (CA7 2003); *Garrett v. Univ. of Ala. Bd. of Trs.*, 344 F.3d 1288, 1292-93 (CA11 2003) (per curiam); *Lovell v. Chandler*, 303 F.3d 1039, 1051-52 (CA9 2002); *Koslow v. Commonwealth*, 302 F.3d 161, 172 (CA3 2002); *Robinson v. Kansas*, 295 F.3d 1183, 1189-90 (CA10 2002); *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628 (CA6 2001); *Jim C. v. United States*, 235 F.3d 1079, 1081 (CA8 2000) (en banc); *Stanley v. Litscher*, 213 F.3d 340, 344 (CA7 2000).[5]

The court of appeals's approach posits that what a State could have reasonably believed is irrelevant: as long as a federal statute can be deemed to provide in unambiguous language that acceptance of the funds triggers loss of immunity, the waiver is necessarily knowing and valid. *See, e.g.*, Pet. App. 38 ("Under *Dole*, if the clear-statement requirement is met, the state is conclusively presumed to have known that receipt of clearly conditioned federal funds requires the state to abide by the condition.").

That approach conflicts directly with the Second Circuit's, that the reasonable understanding of the State is integral to assessing whether the State knowingly and voluntarily waived immunity. *See Garcia*, 280 F.3d, at 114. And, accordingly, the Second Circuit

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5. The *Garcia* court made the split explicit: "Several of our sister circuits have held that a state's acceptance of federal funds constitutes a waiver of its sovereign immunity under § 504 of the Rehabilitation Act. These cases are unpersuasive . . . ." 280 F.3d, at 115 n.5 (citations omitted).

held that, under the facts there presented, New York's acceptance of federal funds did not waive sovereign immunity.[6]

2. The Fifth Circuit's contradicts this Court's precedents by inferring conditional waiver from a statute that is, at a minimum, ambiguous.

As discussed above, *supra* Pet. 12-18, the better reading of the statute is as an unambiguous attempt at abrogation. That reading is most consistent with the plain text of the statute, and is also consistent with the history and context from which the statute arose.

An intent to abrogate would have made sense when Section 2000d-7(a) was passed—in 1986, ten years before the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Section 2000d-7(a) was enacted in response to the Court's 1985 decision in *Atascadero*, which held that Section 504 of the Rehabilitation Act did not express clear congressional intent either

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6. To be sure, *Garcia*'s express rationale was limited to a specific window of time in which this Court's jurisprudence indicated that Title II of the ADA and—because of its almost identical remedies—the Rehabilitation Act validly abrogated States' immunity. *See* 280 F.3d, at 114. The dissenting judges in *Pace* and *Miller* believe that the window would have closed when the Court decided *Garrett*. *See* Pet.App. 72 n.117. Thus, according to the dissent, when the Court held in *Garrett* that Title I of the ADA was an invalid attempt to abrogate States' immunity, States could no longer reasonably believe that their immunity had been validly abrogated by either Title II of the ADA or by the Rehabilitation Act. *See id.* After *Garrett*, therefore, the acceptance of federal funds could accomplish a knowing waiver. *See id.* However, the Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), may have created new uncertainty, because it held that certain applications of Title II are indeed a valid exercise of Congress's power to abrogate. *See id.*, at 533-34. This uncertainty is unlikely to abate, given the Court's declaration in *Lane* that the validity of each application of Title II would be decided on a case-by-case basis. *See id.*

to (1) abrogate states' Eleventh Amendment immunity or (2) to condition federal funding on States' consent to waive that immunity. *See Atascadero*, 473 U.S., at 247.

At that time, Congress believed its Commerce Clause power was sufficient to abrogate States' immunity. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989) (plurality op.) (holding that Commerce Clause granted Congress the power to abrogate state sovereign immunity). It was not until ten years later that the Court overruled *Union Gas* and held that Section 5 of the Fourteenth Amendment was Congress's only authority to abrogate Eleventh Amendment immunity. *Seminole Tribe*, 517 U.S., at 72-73. Therefore, when Congress enacted Section 2000d-7(a), it would have had no reason to seek the States' consent to waive their immunity. Instead, at that time, Congress believed it could abrogate that immunity outright.

But, even assuming *arguendo* that Section 2000d-7(a) is not an unambiguous abrogation, it is—at most—an ambiguous waiver.

Had Congress intended to enact a conditional waiver of immunity, it knew how to do so using unambiguous language. In 1975, for example, Congress amended the Medicaid Act to require States to waive Eleventh Amendment immunity from suit for violations of that Act. *See* PUB. L. NO. 94-182, §111, 89 Stat. 1051 (1975) (repealed 1976). The provision generated tremendous opposition from the States, *see Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1226 n.14 (CA11 2000); *Hosp. Ass'n of N.Y. State, Inc. v. Toia*, 577 F.2d 790, 795 (CA2 1978), however, and was repealed during the next session of Congress, *see* PUB. L. NO. 94-552, 90 Stat. 2540 (1976); *Toia*, 577 F.2d, at 795.

The language repealed from 42 U.S.C. §1396a—unlike Section 2000d-7(a)—unambiguously established a voluntary condition:

> a State plan for medical assistance must include a *consent by the States* to the exercise of the judicial power of the

> United States in any suit brought against the State or a State officer by or on behalf of any provider of services . . . with respect to the application of subsection (a)(13)(D) to services furnished under such plan after June 30, 1975, and *a waiver by the State of any immunity from such a suit conferred by the 11th amendment to the Constitution or otherwise*. PUB. L. NO. 94-182, §111(a), 89 Stat. 1051 (emphasis added).

Unlike Section 2000d-7(a), this statute used the words "consent" and "waiver." *See id.* In contrast, Congress's injection into Section 2000d-7(a) of express abrogation language calls into question whether the necessary predicate to waiver—unequivocal statutory language—is present. When viewed in light of the historical context and Congress's demonstrated ability to speak unmistakably in different contexts, Section 2000d-7(a) falls short of the unambiguous language required for Congress to validly invite States to waive sovereign immunity. Congress must "mak[e] its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S., at 242. It "must speak with a clear voice," and do so "unambiguously," in order to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S., at 17.

Instead, the court of appeals deemed the identical language to be *both* language of abrogation and waiver. "Just because particular language may or may not function with equal efficacy under both exceptions to Eleventh Amendment immunity, does not mean that it fails the clear statement rule." Pet. App. 34. But that approach is identical to the argument advanced—and rejected—in *College Savings Bank*:

> "As further evidence that constructive waiver is little more than abrogation under another name, consider the revealing facts of this case: The statutory provision relied upon to demonstrate that Florida constructively waived its sovereign

> immunity *is the very same provision that purported to abrogate it.*" 527 U.S., at 684 (emphasis added).

Just so, the court of appeals found itself ascribing abrogation and conditional waiver to the identical statutory text, a tension resolved by describing Section 2000d-7(a) as "janus-faced," but nonetheless somehow also "unambiguous, as required by *Dole*." Pet. App. 34. The court arrived at this remarkable conclusion by limiting the requisite level of clarity to only the *fact* that immunity may be lost, and not to the *method* by which it is removed. *See id.* ("Congress need not declare in the statute whether it is proceeding under abrogation or waiver, or both.").

To the contrary, clear notice of the method—*i.e.*, whether immunity is to be forfeited by voluntary or involuntary means—is also required. This Court so indicated in *Atascadero*:

> "[T]he Rehabilitation Act does not evince an unmistakable congressional purpose, pursuant to § 5 of the Fourteenth Amendment, to subject unconsenting States to the jurisdiction of the federal courts. The Act likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S., at 247.

Clear notice of the method is vital to States' ability to "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S., at 17. If a statute abrogates a State's immunity, then the State—having already lost its immunity—may accept federal funds without fear of additional consequences. *See* Pet. App. 71-72 (citing *Garcia*, 280 F.3d, at 114). If, on the other hand, a statute does not abrogate, but gives States the choice whether to waive immunity in exchange for a federal benefit, then the States must weigh carefully the competing interests before accepting the funds.

Reading the plain language of Section 2000d-7(a), it is impossible to discern with any degree of certainty that Congress's intent was to create a conditional waiver. Indeed, such a reading is plausible only in hindsight—some twenty years after the statute was passed and ten years after *Seminole Tribe*—in an attempt to revive the statute's attempted abrogation. But, as the Court cautioned, the rewriting of statutes based on what Congress might have done had it possessed the benefit of hindsight is not the task of the judiciary: "If that effort is to be made, it should be made by Congress, and not by the federal courts." *Seminole Tribe*, 517 U.S. at 76.

II. THE COURT OF APPEALS'S DECISION DISREGARDS *DOLE*'S RELATEDNESS LIMITATION ON CONGRESS'S SPENDING CLAUSE AUTHORITY AND THEREBY THREATENS THE CONSTITUTIONAL BALANCE OF POWER BETWEEN THE FEDERAL GOVERNMENT AND THE STATES.

Another important limitation on Congress's Spending Clause power is that, while "Congress may attach conditions on the receipt of federal funds," *Dole*, 483 U.S., at 206, such conditions "might be illegitimate if they are unrelated 'to the federal interest in *particular* national projects or programs,'" *id.*, at 207 (emphasis added) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality op.)); *see also New York v. United States*, 505 U.S. 144, 167 (1992) (noting that conditions on federal funds must "bear some relationship to the purpose of the federal spending"). Yet, the court of appeals has rendered this limitation nugatory by holding that the federal government's general interest in combating disability discrimination provides a sufficient nexus to condition *any and all* federal grants on a state agency's waiver of immunity from Rehabilitation Act suits. Pet. App. 89. That the court of appeals joined six other circuits in this erroneous conclusion only underscores that this is a recurring issue—one that now requires the Court's intervention to restore meaning to *Dole*'s check on Congress's spending authority, thus preserving the balance between federal and state power envisioned by the Framers.

A. The Relatedness Limitation on Congress's Spending Power Is a Critical Component of Our Federalism.

The principle that conditions attached to a federal grant must be related to the purpose of the grant "is fundamental to our constitutional structure." *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1171 (CADC 2004) (Sentelle, J., dissenting). The Court has recognized that, without this limitation, "the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S., at 167. That is, Congress could simply ignore the boundaries of its power established elsewhere in the Constitution by pursuing its regulatory objectives through conditions attached to any and all disbursements to the States. The Court long ago explained that the Framers could not have contemplated this result, rejecting the suggestion that,

> "[although] the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." *United States v. Butler*, 297 U.S. 1, 78 (1936).

The "relatedness" requirement cabins in this potentially limitless authority for indirect regulation of the States by ensuring that such regulation extends no further than Congress's stated interest in providing the funds.

The need for this check against congressional overreaching through spending conditions is not merely an abstract concern, for two reasons. First, the Court has in recent years recognized real limits on Congress's authority to strip States of their sovereign immunity and subject them to suit. For example, the Court has held

that Congress cannot abrogate States' immunity under Article I of the Constitution, *Seminole Tribe*, 517 U.S., at 72-73, and that congressional abrogation of States' immunity under Section 5 of the Fourteenth Amendment must reflect "congruence and proportionality" to "the injury to be prevented or remedied," *Garrett*, 531 U.S., at 365. Yet, Congress could readily circumvent these holdings if it could extract waivers of state agencies' immunity by forcing them into a Hobson's choice between relinquishing their immunity and forfeiting all federal funds advanced for any purpose. *See Jim C.*, 235 F.3d, at 1085 (Bowman, J., dissenting) (observing that, without proper application of the relatedness requirement, "[b]y resort to the spending power . . . Congress could achieve indirectly the same abrogation of Eleventh Amendment immunity it could not achieve directly"). *Dole*'s relatedness limitation, properly applied, forecloses such an outcome.

Second, the States' supposed ability to avoid congressional mandates simply by refusing the offered funds becomes illusory if Congress can condition the grant of *any and all* financial assistance on immunity waivers that bear no relation to the federal interest in advancing the funds. Under these circumstances, "[g]iven the financial and political reality within which state governments struggle to fund their operations adequately, most if not all of the states would yield." *Jim C.*, 235 F.3d, at 1085 (Bowman, J., dissenting).

Indeed, writing for an en banc plurality, Judge Luttig has powerfully cautioned against such expansive interpretations of Congress's spending power "in a time when the several States have become increasingly dependent on the Federal Government for funds, because the Federal Government has increasingly become dependent upon the revenues from taxation it receives from the citizens of the several States." *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (CA4 1997) (en banc) (plurality op.). *Dole*'s relatedness

requirement ensures that Congress may not so easily "invade the states' jurisdiction." *Butler*, 297 U.S., at 78.

B. The Court of Appeals's Decision Disregards *Dole*'s Relatedness Requirement.

In *Dole*, the Court held that the relatedness requirement was met only because the condition imposed on the grant of federal highway funds—requiring States to adopt a minimum drinking age of 21—"*directly related* to one of the main purposes for which highway funds are expended—safe interstate travel." 483 U.S., at 208 (emphasis added). By contrast, in the companion case that controlled the decision below, the court of appeals did not even examine the nature or purpose of the federal funds received, holding broadly that the relatedness requirement is satisfied in Rehabilitation Act suits against a state agency that receives *any* federal funds. *See* Pet. App. 89. The court of appeals instead identified three other limitations in Section 2000d-7(a) that it believed supplied the requisite relationship between the funds and the waiver condition. *See id.* In fact, these supposed limitations do not meaningfully limit Congress's spending power and, consequently, the court of appeals's holding seriously undermines *Dole*'s relatedness requirement.

First, the court of appeals reasoned that Congress's "'clear interest in eliminating disability discrimination in state departments or agencies . . . flows with every dollar spent by a department or agency receiving federal funds.'" *Id.* (quoting *Koslow*, 302 F.3d, at 175-76). This rationale cannot be squared with *Dole*'s requirement that there be a relationship between the waiver condition and the federal interest in "particular" projects. 483 U.S., at 207. Moreover, as Judge Sentelle explained in dissenting from the D.C. Circuit's adoption of this reasoning, allowing Congress to condition federal grants based on such generalized interests produces a form of unfettered authority that clashes with the constitutional framework establishing a federal government of limited powers:

> "The majority and the government are saying that the legislature can identify something a state does that it does not like—in this case, discriminate on the basis of disability—and condition *any* grant of funds on a state's not doing that act any more, assuming the condition is otherwise constitutionally valid. Presumably, Congress has an 'interest' in preventing states from doing anything with its funds that it does not like, and there is nothing magical about disability discrimination that makes the 'interest' in preventing it distinctively federal. If such an 'interest' were enough to sustain such legislation, that would leave the Spending Clause without any 'judicially enforceable outer limit [].' In a system in which the federal government's powers remain limited and enumerated, such an argument must fail." *Barbour*, 374 F.3d, at 1172-73 (Sentelle, J., dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 566 (1995)).

In other words, if the court of appeals were correct that Congress's general opposition to disability discrimination provides a sufficient nexus to impose waiver conditions on *any* federal grant, then *Dole*'s relatedness requirement would be rendered superfluous.

Second, the court of appeals stated that Section 2000d-7(a)'s waiver applies only to the agency that accepts the funds, and not to other agencies or the State as a whole, which "helps ensure" that *Dole*'s relatedness requirement is met. Pet. App. 89 (quoting *Koslow*, 302 F.3d, at 176). But because Section 2000d-7(a) attaches its waiver condition to the receipt of *any* federal funds, this limitation at most only ensures that the relatively few state agencies receiving *no* federal funding whatsoever will avoid the condition. This limitation in no way advances the requirement that the funding condition "bear some relationship to the *purpose* of the federal spending." *New York*, 505 U.S., at 167 (emphasis added). Indeed, neither in this case nor in *Miller* did the court of appeals examine the purpose of the funds received by the defendant agencies; it was

sufficient that the agencies admitted to receiving even one federal dollar.

Finally, the court of appeals cited the "practical" consideration that an agency's federal funding cannot be traced to the particular practice challenged by the plaintiff's Rehabilitation Act suit. *See* Pet. App. 89. This is a straw man. No one seriously contends that *Dole* demands such a specific connection between the federal funds and the action that allegedly violates the Rehabilitation Act. For example, the Department does not argue that Espinoza must show that federal funds received by the Department paid for the facility where she applied for her drivers license or for the licensing program in general. If the Department had received any Rehabilitation Act funds—which it did not—that would surely satisfy *Dole*'s relatedness requirement, assuming that, as in *Dole*, the condition was found to be "*directly related* to one of the main purposes for which [the] funds are expended." 483 U.S., at 208 (emphasis added).

C. The Courts of Appeals' Recurring Disregard of *Dole*'s Relatedness Requirement Warrants the Court's Review.

There is no circuit split on the question of Section 2000d-7(a) and *Dole's* relatedness requirement. To date, six circuits have agreed with the Fifth Circuit, upholding Section 2000d-7(a) against relatedness challenges based on similar reasoning. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 493 (CA4 2005) (noting that waiver applies only to agency that receives funds); *Barbour*, 374 F.3d, at 1169 (citing Congress's desire that no federal funds be used to facilitate disability discrimination); *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 128 (CA1 2003) (same); *Lovell v. Chandler*, 303 F.3d 1039, 1051 (CA9 2002) (citing Congress's interest that federal funds not be used in a discriminatory manner and that waiver applies only to agency that receives federal funds); *Koslow*, 302 F.3d, at 175-76 (providing three reasons adopted by the Fifth Circuit in *Miller*); *Jim C.*, 235

F.3d, at 1081 (noting that waiver applies only to agency that receives funds).

In the courts of appeals, *Dole*'s relatedness requirement has little if any force. As two commentators have explained, even outside of the Rehabilitation Act context, the absence of guidance from the Court on the relatedness ceiling has diluted its meaning:

> "Although no court has denied the existence or justiciability of *Dole*'s 'relatedness' requirement, nearly all have given it *only cursory attention*. In most instances in which the requirement has been a focus of litigation, the court has done little more than assert, without analysis or elaboration, that the challenged condition is 'reasonably related to the federal interest in the national program.' Thus, the lower courts have had little difficulty upholding a wide range of funding conditions without a clearly explained relationship to the underlying legislation . . . ." Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 466 (2003) (emphasis added).

The issue has percolated long enough. Because the court of appeals held that Section 2000d-7(a) satisfies *Dole*'s relatedness requirement—despite concluding that it conditions a waiver of sovereign immunity on the receipt of even a single penny of federal money, from any source, for any purpose—this case provides an ideal vehicle for the Court to revisit the question it reserved in *Dole* and define the "outer bounds" of this important check on Congress's Spending Clause power.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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(3)

No. 05-671

In the Supreme Court of the United States

TEXAS DEPARTMENT OF PUBLIC SAFETY, PETITIONER

v.

JULIE DUNLOP ESPINOZA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUIESTION PRESENTED

Whether petitioner is subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because it waived its Eleventh Amendment immunity when it applied for and acceepted federal financial assistance.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The opinion of the district court (Pet. App. 4-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. The petition for a writ of certiorari was filed on November 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C.

794(a). Individduals have a private right of action for damages againsst entities that receive federal funds and violate that prohhibition. See 29 U.S.C. 794(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (19999).

In 1985, thiss Court held that the text of Section 504 was not sufficieently clear to evidence Congress's intent to condition fedderal funding on a waiver of Eleventh Amendment immmunity for private damages actions against state enntities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Conngress enacted 42 U.S.C. 2000d-7 as part of the Rehabilittation Act Amendments of 1986, Pub. L. No. 99-506, § 1(003, 100 Stat. 1845. Section 2000d-7(a) provides, in releevant part:

> (1) A Staate shall not be immune under the Eleventh Amendiment of the Constitution of the United States from a suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] * * * *.
>
> (2) In a suit against a State for a violation of a statute referrred to in paragraph (1), remedies (including remedies both at law and in equity) are available forr such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. 2000d-7(a).

2. Respondent Julie Espinoza suffers from a disability under by the Rehabilitation Act. In September 2000, she sued the Texas Department of Public Safety, alleging that the agency discriminated against her on the

basis of her disability in violation of Section 504 and other state and federal laws when it required her to submit to a comprehensive examination in order to qualify for a driver's license. Pet. App. 5. Espinoza initially sought damages, attorneys fees, declaratory relief, and a temporary and permanent injunction. *Ibid.* The state agency moved to dismiss Espinoza's Section 504 claims as barred by its Eleventh Amendment immunity. *Id.* at 6. Subsequently, Espinoza moved to amend her complaint to remove her claims for damages against the agency and to add its director in his official capacity as a defendant, for purposes of seeking prospective injunctive relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 10-11.

The district court simultaneously ruled on both motions, granting the motion to amend the complaint and denying the State's motion to dismiss. Pet. App. 15. With respect to the latter motion, the court held that Congress validly conditioned receipt of federal funds on the agency's waiver of sovereign immunity to Section 504 claims and that, by accepting federal funds under such conditions, the agency had waived its sovereign immunity. *Id.* at 8-10. The State filed an interlocutory appeal to challenge the denial of its Eleventh Amendment immunity defense. *Id.* at 3.

3. The United States intervened on appeal pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the statutory provisions conditioning the receipt of federal financial assistance on a knowing and voluntary waiver of sovereign immunity. Before hearing oral argument, the Fifth Circuit held the case in abeyance pending decisions from the en banc court in *Pace* v. *Bogalusa City School Board*, No. 01-31026, and in

Miller v. *Texas Tech Health Sciences Center*, Nos. 02-10190, 02-30318, and 02-30389.

4. On March 8, 2005, the en banc court of appeals issued its decision in *Pace*, holding that the state agency defendant knowingly and voluntarily waived its Eleventh Amendment immunity to claims under Section 504 when it accepted federal funds, and that Section 504 is a valid exercise of Congress's authority under the Spending Clause. *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005), cert. denied, 126 S. Ct. 416 (2005); Pet. App. 17-76. Relying on this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the court held that "congressional spending programs that are enacted in pursuit of the general welfare and unambiguously condition a state's acceptance of federal funds on reasonably related requirements are constitutional *unless* they are either (1) independently prohibited or (2) coercive." *Pace*, 403 F.3d at 279; Pet. App. 27. The court noted that the State had not disputed that the Spending Clause statute at issue in the case was "enacted in pursuit of the general welfare" and was "sufficiently related to the federal interest in the program funded." 403 F.3d at 280; Pet. App. 30. The court proceeded to consider the other requirements for a valid exercise of congressional power under the Spending Clause.

The court held that the conditions on federal spending in Section 2000d-7 are "unambiguous." 403 F.3d at 282; Pet. App. 34. The court explained that "during the relevant time period, [Section] 2000d-7 * * * put each state on notice that, by accepting federal money, it was waiving its Eleventh Amendment immunity." 403 F.3d at 284; Pet. App. 38. The court rejected the state agencies' attempt to "engraft[] a subjective-intent element

onto the otherwise objective Spending Clause waiver inquiry," holding that the fact that a State 'might not 'know' subjectively whether it had any immunity [left] to waive by agreeing to th[e] [statutory] conditions is wholly irrelevant." 403 F.3d at 284; Pet. App. 38. The court concluded that, in light of the unambiguous statutory condition, the State's "waiver of Eleventh Amendment immunity to actions under § 504 * * * was knowing." 403 F.3d at 285; Pet. App. 39.

The court also held that Section 2000d-7 does not violate any independent constitutional prohibition. The court concluded that the statute does not violate the "unconstitutional-conditions" doctrine, because States as sovereigns, unlike private parties, have the resources to protect their interests and because in any event the need to protect a State from "coercion or compulsion * * * is subsumed in the non-coercion prong of the *Dole* test." 403 F.3d at 286-287; Pet. App. 41-43. The court also concluded that the conditions in Section 2000d-7 are not unduly coercive. The court noted that, to avoid suit under Section 504, a "state would not have to refuse all federal assistance." 403 F.3d at 287; Pet. App. 43. Instead, "[a] state can prevent suits against a particular agency under § 504 by declining federal funds for that agency." 430 F.3d at 287; Pet. App. 43. The court accordingly "refuse[d] to invalidate Louisiana's waiver on coercion grounds." 430 F.3d at 287; Pet. App. 43.

Judge Jones, joined by five other judges, concurred in part and dissented in part. 403 F.3d at 297-303; Pet. App. 65-76. She agreed with the majority that the Spending Clause statutes at issue in this case are "not unconstitutionally coercive." 403 F.3d at 299 n.2; Pet. App. 68 n.113. But in her view, a State may not be found to have waived its right to sovereign immunity unless it